August 17, 2005

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Response to Commenter's Comments on CG Docket No. 02-278

Dear Ms. Dortch:

Enclosed are our comments of the American Financial Services Association. We appreciate the opportunity to comment on the Proposed Rule. Should you have any questions about this letter, please do not hesitate to contact the undersigned at (202) 466-8606.

Respectfully submitted,

Robert McKew
Senior Vice President and General Counsel
American Financial Services Association

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
ALLIANCE CONTACT SERVICES, *et al.*	)	CG Docket No. 02-278
	)	
Joint Petition for Declaratory Ruling That	)	
The FCC has Exclusive Regulatory Jurisdiction	)	
Over Interstate Telemarketing	)	

REPLY COMMENTS OF THE AMERICAN FINANCIAL SERVICES ASSOCIATION IN SUPPORT OF ALLIANCE CONTACT SERVICES, *et al's* PETITION FOR DECLARATORY RULING

Introduction

The American Financial Services Association ("AFSA" or "the Association")[1] joins in the Reply Comments of the Direct Marketing Association and the Interstate Sellers and Teleservices Providers ("ITSP") that support the Joint Petition for Declaratory Ruling submitted by Alliance Contact Services, *et al.* (the "Petition"). We write separately to address the opposition of the National Association of Attorneys General ("NAAG") to the Petition and to stress a single point: in opposing the Petition, NAAG grossly exaggerates the impact of the relief requested therein while simultaneously ignoring the clarity of the FCC's legal authority and responsibility to regulate telemarketers.

[1] Founded in 1916, the American Financial Services Association (AFSA) is the trade association for a wide variety of market-funded providers of financial services to consumers and small businesses. AFSA members are important sources of credit to the American consumer, providing approximately over 20 percent of all consumer credit. AFSA member companies offer or are assigned many types of credit products including credit cards, retail credit, automobile retail installment contracts, and mortgage loans.

State Fraud and Consumer Protection Statutes Still May be Enforced by the States.

The Association completely agrees with NAAG that states do have, and should have, authority to enforce consumer protection laws. Indeed, state regulation and enforcement of fraud laws inures to the benefit of Association members by ensuring a level playing field for those telemarketers who abide by the law. NAAG, however, fails to specifically demonstrate how the relief sought by petitioners would have any meaningful effect on the states' ability to enforce such laws.

Indeed, it is simply a gross overstatement that FCC preemption of conflicting state telemarketing laws will "allow consumers to go unprotected against interstate telephone scams and harassment." NAAG comments at 3. The federal Communications Act has existed for more than seventy years and the TCPA for fourteen years, and, despite the scenario painted by NAAG, prosecution of state consumer protection statutes has not been impeded. To illustrate the exaggeration with a simple example, federal preemption of a differing state definition of "established business relationship," as in the case of the Florida telemarketing laws, certainly is not going to result in the wholesale abandonment of state consumer protections. In fact, the NAAG comments themselves perhaps best illustrate this point in citing several successful prosecutions under general state fraud laws notwithstanding the fact that the underlying actions involved interstate communications.[2]

[2] *See People ex rel. Spitzer v. Telehublink Corp.*, 756 N.Y.S.2d 285, 287-88 (N.Y. App. Div. 2003) (violation of state fraudulent conduct and deceptive practices law); *Commonwealth v. Events Int'l, Inc.*, 585 A.2d 1146, 1147 (Pa. Commw. Ct. 1991) (violations of state charitable solicitation and deceptive practices statutes); *State v. Cain*, 757 A.2d 142 (Md. 2002) (violation of state theft-by-deception statute); *State v. Minimum Rate Pricing, Inc.*, 1998 WL 428810 (Minn. Dist. Ct. 1998) (violation of state fraud statutes); *State v. Western Express Serv. Co.,* 1995 WL 911525 (Ohio Com. Pl. 1995) (enjoining interstate communication of prize winnings on basis of state deceptive practices law). One of the cases cited by NAAG, *State v. Rowell*, 908 P.2d 1379 (N.M. 1995), actually did *not* find the violation of any state law, contrary to NAAG's description of the holding.

The distinction readily apparent here is that regulation of the *content* of a communication is not the same as regulation of the *manner* of the communication. Congress in enacting the TCPA clearly charged the FCC with the responsibility to set a comprehensive, coherent framework by which telemarketers may offer their goods and services. It is only the manner by which legitimate telemarketing activities are performed that requires further FCC action here. Indeed, uniformity in the rules with which interstate telemarketers must comply is one of the issues the FCC specifically called out as a concern in its first Report and Order under the TCPA,[3] and, given the numerous conflicting state laws, that concern has been proven justified. On the other hand, regulation of the *content* of the calls, to the extent they involve fraudulent representations, continues to remain primarily the province of the individual states. Regardless of the action the FCC takes on the various pending petitions, fraud will still be illegal in every state and fraud will still be prosecuted in every state whether or not the fraudulent act is committed through the use of an interstate telephone call.

If, however, there is any question as to the scope of the states' authority to curb fraudulent activities, the appropriate action for the FCC is not to shy from its regulatory responsibilities, but to clearly articulate the situations in which the states may continue to enforce their fraud laws. Of course, great care must be taken to ensure that the exceptions do not incidentally allow states to interpret state statutes so as to prohibit legitimate telemarketing activities otherwise specifically addressed in the TCPA or the FCC's regulations. The Association suggests, then, that the resulting order expressly state that

[3] "We conclude that harmonization of the various state and federal do-not-call programs to the greatest extend possible will reduce the potential for consumer confusion and regulatory burden on the telemarketing industry." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd. 14014, 14063 ¶74 (2003).

state regulation and enforcement of fraudulent activities committed via interstate telephone communications is not subject to the preemption order, but interstate telemarketing activities otherwise addressed in either the TCPA or its implementing regulations may not be restricted by state law.

The FCC Has Both the Authority and Obligation to Preempt State Laws that Conflict with the TCPA.

Once the policy argument is peeled away, there's very little to NAAG's position. Certainly, NAAG has not provided any legal basis for challenging the requested relief.

Unlike obscene telephone calls or fraud calls which states have traditionally prosecuted, Congress has specifically spoken to the issue of marketing through the use of the telephone and placed the authority and responsibly for regulating that activity with the FCC. NAAG does not challenge the basic assumption that the FCC has plenary authority in this area.[4] Indeed, NAAG apparently concedes the authority of the FCC, instead arguing that FCC should not grant the Petition as a matter of public policy. On that point, as set forth above, NAAG fails.

[4] Contrast this position with prior submissions, such as that submitted by the state of Florida which argued that the TCPA did not preempt state laws at all and that sovereign immunity actually barred the FCC from even hearing the preemption petition. *See* State of Florida's Motion to Dismiss for Lack of Jurisdiction and Other Grounds in *In re Petition for Declaratory Ruling of Express Consolidation, Inc.,* CG Docket No. 02-278.

Accordingly, the FCC should grant the Petition and enter an order expressly stating the circumstances under which state regulation of telemarketing laws are preempted.

Respectfully submitted,

Robert McKew
Senior Vice President and General Counsel
American Financial Services Association

August 18, 2005